SAN FRANCISCO
BAYKEEPER®

October 5, 2012

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear Sirs:

I am writing on behalf of San Francisco Baykeeper ("Baykeeper") to give notice that Baykeeper intends to file a civil action against E Recycling of California ("ERC") for violations of the Clean Water Act ("CWA") at ERC's electronic waste recycling facility located at 31775 Hayman Street in Hayward, California (the "Facility").

This letter addresses ERC's unlawful discharge of pollutants from its industrial facility into San Francisco Bay and the ongoing and continuous violations of the substantive and procedural requirements of the Clean Water Act and National Pollution Discharge Elimination System ("NPDES") General Permit No. CAS000001 [State Water Resources Control Board] Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ ("Industrial Stormwater Permit").

CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action under CWA section 505(a), 33 U.S.C. § 1365(a), a citizen must give notice of his or her intent to file suit. Notice must be given to the alleged violator, the U.S. Environmental Protection Agency, and the State in which the violations occur.

As required by the CWA, this Notice of Violation and Intent to File Suit provides notice of the violations that have occurred and which continue to occur at ERC's Facility. Baykeeper's investigations have uncovered significant violations of the Industrial Stormwater Permit at the Facility. Consequently, ERC is hereby placed on formal notice that, after the expiration of sixty (60) days from the date of this Notice of Violation and Intent to File Suit, Baykeeper intends to file suit in federal court against ERC under CWA

section 505(a), 33 U.S.C. §1365(a), for CWA violations. These violations of the Industrial Stormwater Permit and the CWA are described more fully below.

During the 60-day notice period, we would like to discuss effective remedies for the violations identified in this letter. If ERC wishes to pursue such discussions, we suggest that ERC initiate those discussions within the next twenty (20) days so that they may be completed at the conclusion of the 60-day notice period. Please note that we do not intend to delay the filing of a complaint in federal court even if discussions are continuing when that period ends.

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"}I. BACKGROUND

Baykeeper is a non-profit public benefit corporation organized under the laws of California, with its main office in San Francisco, California. Baykeeper's purpose is to preserve, protect, and defend the environment, wildlife, and natural resources of San Francisco Bay, its tributaries, and other waters in the Bay Area, for the benefit of local communities. To further its goals, Baykeeper actively seeks federal and state agency implementation of state and federal water quality related laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members. Baykeeper has over two thousand members who use and enjoy the San Francisco Bay and other waters for various recreational, educational, and spiritual purposes. Baykeeper's members' use and enjoyment of these waters are impacted by ERC's operations.

In most of the San Francisco Bay area, stormwater flows untreated either directly, or through the storm drain system, into San Francisco Bay and other receiving waters. The consensus among agencies and water quality specialists is that stormwater pollution accounts for more than half of the total pollution entering the Bay environment each year. With every rainfall event, hundreds of millions of gallons of polluted rainwater, originating from area industries, pour into the Bay and its tributaries. These contaminated stormwater discharges can and must be controlled for the Bay ecosystem to regain its health.

Discharges of stormwater and non-stormwater from recycling facilities are of significant concern because the industrial activities associated with these sites make various pollutants particularly accessible to stormwater. Specifically, facilities such as ERC are engaged in the collecting, processing, and recycling of electronic wastes, which contain heavy metals, a wide range of toxic and hazardous materials, and other pollutants that can come into contact with stormwater.

II. THE LOCATION OF THE ALLEGED VIOLATIONS

The violations alleged in this notice letter have occurred and continue to occur at the Facility, located at 31775 Hayman Street, Hayward, CA 94544. Contaminated stormwater discharges from the Facility into nearby storm drains which drain to San Francisco Bay. Violations of the substantive and procedural requirements of the General

Industrial Permit and the Clean Water Act have occurred and continue to occur at the Facility.

A. The Facility

ERC operates the Facility, which consists of a large warehouse and outdoor storage areas. ERC collects bulk electronic waste for recycling and resale of the component metal, plastic, and glass materials. Much of the waste processing occurs inside the warehouse, but some processing and storage occurs outside. Stormwater from the Facility flows into nearby streets and storm drains, which discharge directly to San Francisco Bay.

B. The Affected Waters

Stormwater from the Facility reaches San Francisco Bay via storm drains in Hayward. San Francisco Bay is a water of the United States. The CWA requires that water bodies such as San Francisco Bay meet water quality objectives that protect specific "beneficial uses." The beneficial uses of the San Francisco Bay and its tributaries include commercial and sport fishing, estuarine habitat, fish migration, navigation, preservation of rare and endangered species, water contact and non-contact recreation, shellfish harvesting, fish spawning, and wildlife habitat.

The San Francisco Bay Basin (Region 2) Water Quality Control Plan ("Basin Plan") seeks to protect and maintain aquatic ecosystems and the resources those systems provide to society through water quality objectives and standards.[1] The Basin Plan acknowledges discharges of urban industrial site stormwater as a significant source of pollution adversely affecting the quality of local waters. Contaminated stormwater from ERC's Facility adversely impacts the water quality of San Francisco Bay watershed and threaten the ecosystem of this watershed, which includes significant habitat for listed rare and endangered species.

San Francisco Bay and its shoreline, tributaries, and adjacent wetlands are ecologically sensitive areas. Although pollution and habitat destruction have drastically diminished the Bay's once-abundant and varied fisheries, the Bay and its wetlands and tributaries are still essential habitat for dozens of fish and bird species as well as macro-invertebrate and invertebrate species. Stormwater contaminated with sediment, heavy metals, and other pollutants harms the special aesthetic and recreational significance that the San Francisco Bay has for people in the surrounding communities. San Francisco Bay is used by kayakers and windsurfers, as well as recreational and subsistence anglers.

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[1] The Basin Plan is published by EPA at: http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/2009_03_16_standards_wqslibrary_ca_ca_9_san_francisco.pdf. (Last accessed on 10/1/12).
The Basin Plan is also published by the Regional Board at: http://www.waterboards.ca.gov/sanfranciscobay/basin_planning.shtml#2004basinplan. (Last accessed on 10/1/12).

The public's usage of the San Francisco Bay for water contact sports exposes many people to toxic metals and other contaminants in stormwater runoff. Non-contact recreational and aesthetic opportunities, such as wildlife observation, also are damaged by stormwater contaminants discharged to San Francisco Bay.

It is unlawful to discharge pollutants to waters of the United States, such as San Francisco Bay, without an NPDES permit or in violation of the terms and conditions of an NPDES permit. ERC has submitted an NOI to be authorized to discharge stormwater from the Facility under the Industrial Stormwater Permit. Other than discharges covered under the Industrial Stormwater Permit, the Facility lacks NPDES permit authorization for any other discharges of pollutants into waters of the United States.

Based on information available to Baykeeper, ERC has violated and is in violation of the Industrial Stormwater Permit and the Clean Water Act. Consequently, ERC is hereby placed on formal notice that, after the expiration of sixty (60) days from the date of this Notice of Violation and Intent To File Suit, Baykeeper intends to file suit in federal court against ERC under CWA section 505(a), 33 U.S.C. § 1365(a), for its violations of the CWA.

III. THE ACTIVITIES AT THE FACILITIES ALLEGED TO CONSTITUTE VIOLATIONS AND THE EFFLUENT LIMITATIONS VIOLATED

ERC engages in collecting, processing, recycling, and storing of electronic wastes. Electronic wastes such as those found at ERC generally contain a wide variety of toxic and hazardous materials including epoxy resins, fiberglass, PCBs, PVC, thermosetting plastics, lead, tin, copper, silicon, beryllium, carbon, iron, aluminum, cadmium, mercury, thallium, other metals, and other pollutants. Some of ERC's operations occur outdoors and are exposed to rainfall. Stormwater flows from the Facility into nearby storm drains, which drain to San Francisco Bay.

As a result of the pollutant-generating activities at the Facility, contaminated stormwater runs off the Facility and discharges into nearby storm drains which discharge to San Francisco Bay. Information available to Baykeeper indicates that ERC has failed to comply with all requirements of the Industrial Stormwater Permit. As further described below, these actions constitute violations of CWA.

A. Discharges in Violation of the Industrial Stormwater Permit

The CWA provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharger is in compliance with the terms of a NPDES permit. CWA § 301(a), 33 U.S.C. § 1311(a); *see also* CWA § 402(p), 33 U.S.C. § 1342(p) (requiring NPDES permit issuance for the discharge of stormwater associated with industrial activities). The Facility discharges stormwater associated with industrial activity to San Francisco Bay and its tributaries. The Industrial Stormwater Permit authorizes discharges of stormwater, conditioned on ERC's compliance with the terms of the General Permit. Information available to Baykeeper indicates that stormwater

discharges from the Facility have violated several of these permit terms, thereby violating the CWA. *Id.*

1. Discharges in Excess of BAT/BCT Levels

The Effluent Limitations of the Industrial Stormwater Permit prohibit the discharge of pollutants from the Facility in concentrations above the level commensurate with the application of best available technology economically achievable ("BAT") for toxic pollutants[2] and best conventional pollutant control technology ("BCT") for conventional pollutants.[3] Industrial Stormwater Permit, Order Part B(3). The EPA has published Benchmark Values set at the maximum pollutant concentration present if an industrial facility is employing BAT and BCT.[4] Baykeeper has collected stormwater discharging from the Facility driveway on two occasions this year, and the samples were analyzed for various pollutants. The stormwater samples exceeded EPA Benchmarks for total suspended solids ("TSS"), aluminum, iron, lead, and zinc. In addition, ERC self-reported Benchmark exceedances of zinc during the 2007-2008 wet season and electrical conductivity during the 2008-2009 and 2011-2012 wet seasons. Exceedances, both from ERC's self-reported data and Baykeeper's samples, indicate that ERC has failed and is failing to employ measures that constitute BAT and BCT for electronic waste recycling facilities in violation of the requirements of the Industrial Stormwater Permit. In addition, based on visual observations of the Facility, ERC's BMPs do not constitute BAT and BCT. For example, ERC stores electronic wastes outside and uncovered where it is exposed to rainfall. Proper BAT and BCT measures could include, but are not limited to, moving certain pollution-generating activities under cover or indoors, capturing and effectively filtering or otherwise treating all stormwater prior to discharge, frequent sweeping to reduce the build-up of pollutants on-site, and other similar measures for reducing stormwater pollutant discharges to the limits of available, economically achievable technology.

Based on Baykeeper's own visual observations of conditions at the Facility and on the exceedances detected in stormwater samples Baykeeper collected, each time ERC discharges stormwater, ERC is not meeting BAT and BCT requirements. Baykeeper alleges and hereby notifies ERC that each day that ERC has discharged stormwater from the Facility, that stormwater contained levels of pollutants which may be exceeding Benchmark values for TSS, aluminum, iron, lead, and/or zinc, among other pollutants. Baykeeper alleges that ERC has discharged stormwater containing excessive levels of pollutants from the Facility to San Francisco Bay during at least every significant local

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[2] BAT is defined at 40 C.F.R. § 442.23. Toxic pollutants are listed at 40 C.F.R. § 401.15 and include copper, lead, and zinc, among others.

[3] BCT is defined at 40 C.F.R. § 442.22. Conventional pollutants are listed at 40 C.F.R. § 401.16 and include BOD, TSS, oil and grease, pH, and fecal coliform.

[4] These Benchmark Values are presented in Attachment 1 and can be found at: http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf and http://cwea.org/p3s/documents/multi-sectorrev.pdf (Last accessed on 10/1/12).

rain event over 0.1 inches in the last five years.[5] Attachment 2 compiles all dates in the last five (5) years when a significant rain event occurred.

Baykeeper alleges that ERC's unlawful discharges of stormwater from the Facility with levels of pollutants exceeding BAT and BCT levels of control have occurred and continue to occur during all significant rain events. Further, ERC's ongoing discharge of stormwater containing levels of pollutants above EPA Benchmark values and BAT- and BCT-based levels of control necessarily demonstrates that ERC has not developed and/or implemented sufficient Best Management Practices ("BMPs") at the Facility to prevent stormwater flows from coming into contact with the sources of contaminants at the Facility or otherwise to control the discharge of pollutants from the Facility. Thus ERC has not developed and/or implemented adequate pollution controls to meet BAT and BCT at the Facility, and has violated and will continue to violate the Clean Water Act and the Industrial Stormwater Permit each and every day ERC discharges stormwater without meeting BAT/BCT. Each discharge of stormwater from the Facility constitutes a separate violation of the Industrial Stormwater Permit and the CWA. These violations occurred on each day in Attachment 2 in which rainfall was greater than 0.1 inches and continue to occur. ERC is subject to civil penalties for each violation of the Industrial Stormwater Permit and the CWA within the past five (5) years.

2. Discharges Impairing Receiving Waters

The Industrial Stormwater Permit's Discharge Prohibitions prohibit stormwater discharges that cause or threaten to cause pollution, contamination, or nuisance. *See* Industrial Stormwater Permit, Order Part A(2). The Industrial Stormwater Permit also prohibits stormwater discharges to surface or groundwater that adversely impact human health or the environment. *Id.* at Order Part C(1). Receiving Water Limitations of the Industrial Stormwater Permit prohibit stormwater discharges that cause or contribute to an exceedance of applicable Water Quality Standards ("WQS"). *Id.* at Order Part C(2). Applicable WQSs are set forth in the California Toxics Rule ("CTR")[6] and the Basin Plan and found in Attachment 3. Exceedances of WQSs are violations of the Industrial Stormwater Permit, the CTR, and the Basin Plan.

The Basin Plan, *inter alia*, establishes the following Water Quality Standards for San Francisco Bay and its tributaries:

- Waters shall not contain substances in concentrations that result in the deposition of material that cause nuisance or adversely affect beneficial uses.

- Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.

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[5] Significant local rain events are reflected in the rain gauge data available at http://cdec.water.ca.gov and http://lwf.ncdc.noaa.gov/oa/ncdc.html. (Last accessed on 10/1/12).

[6] The CTR is set forth at 40 C.F.R. § 131.38 and is explained in the Federal Register preamble accompanying the CTR promulgation set forth at 65 Fed. Reg. 31682.

- Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases from normal background light penetration or turbidity relatable to waste discharge shall not be greater than 10 percent in areas where natural turbidity is greater than 50 NTU.

- All waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms. Detrimental responses include, but are not limited to, decreased growth rate and decreased reproductive success of resident or indicator species. There shall be no acute toxicity in ambient waters. Acute toxicity is defined as a median of less than 90 percent survival, or less than 70 percent survival, 10 percent of the time, of test organisms in a 96-hour static or continuous flow test. There shall be no chronic toxicity in ambient waters. Chronic toxicity is a detrimental biological effect on growth rate, reproduction, fertilization success, larval development, population abundance, community composition, or any other relevant measure of the health of an organism, population, or community.

- Surface waters shall not contain concentrations of chemical constituents in amounts that adversely affect any designated beneficial use. See the Basin Plan's Table 3-3 for specific marine water quality objectives for toxic pollutants.[7]

Baykeeper alleges that ERC's stormwater discharges have caused or contributed to exceedances of the Water Quality Standards ("WQS") set forth in the Basin Plan and California Toxics Rule. These allegations are based on information available to Baykeeper, including stormwater samples collected from the Facility. Stormwater samples were analyzed for various metals and were found to exceed the Basin Plan's receiving water limits for copper and zinc. In addition, ERC's self-reported data provided to the Regional Board indicates the exceedance of receiving water limits for zinc during the 2007-2008 wet season. Based on information available to Baykeeper, these sample results are representative of the pollutant levels in the Facility's discharges of stormwater. In every instance when ERC has discharged stormwater, including instances when the Facility has discharged stormwater that has not been sampled, these stormwater discharges contained comparable levels of pollutants. Accordingly, ERC is exceeding WQS on each day when stormwater is discharging from the Facility, in addition to the days on which samples are obtained.

Stormwater samples collected at the Facility contained the following pollutants: TSS, aluminum, copper, iron, lead, and zinc. The levels of these pollutants in ERC's

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[7] Basin Plan, Table 3-3 is available at: http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/planningtmdls/basinplan/web/tab/tab_3-03.pdf. (Last accessed on 10/1/12).

stormwater discharges have caused pollution, contamination, or nuisance in violation of the Discharge Prohibitions of the Industrial Stormwater Permit, and have adversely impacted the environment in violation of the Receiving Water Limitations of the Industrial Stormwater Permit. *See* Industrial Stormwater Permit, Order Parts A(2) and C(2). Moreover, the discharge of these pollutants has caused or contributed to San Francisco Bay's failure to attain one or more applicable WQS in violation of the Receiving Water Limitations. *Id.* at Order Part C(2).

Baykeeper alleges that each day that ERC discharged stormwater from the Facility, ERC's stormwater contained levels of pollutants that exceeded one or more of the applicable WQS in San Francisco Bay. ERC discharged stormwater from the Facility during at least every significant local rain event over 0.1 inches and thereby has caused or contributed to Water Quality Standards not being met in San Francisco Bay in the last five years. Significant local rain events in the last five (5) years are compiled in Attachment 2 and otherwise available at http://cdec.water.ca.gov and http://lwf.ncdc.noaa.gov/oa/ncdc.html (Last accessed on 10/1/12). ERC's unlawful discharges from the Facility have occurred and continue to occur presently during all significant rain events.

Each discharge from the Facility that has caused or contributed, or causes or contributes to an exceedance of an applicable WQS constitutes a separate violation of the Industrial Stormwater Permit and the CWA. ERC is subject to penalties for each violation of the Industrial Stormwater Permit and the CWA within the past five (5) years.

3. Failure to Develop and/or Implement an Adequate Storm Water Pollution Prevention Plan ("SWPPP"), as Required by the Industrial Stormwater Permit.

The Industrial Stormwater Permit requires dischargers covered by the Industrial Stormwater Permit and commencing industrial activities before October 1, 1992 to develop and implement an adequate SWPPP by October 1, 1992. Industrial Stormwater Permit, Section A: Storm Water Pollution Prevention Plan Requirements, (1)(a). The Industrial Stormwater Permit also requires dischargers to make all necessary revisions to existing SWPPPs promptly, and in no case later than August 1, 1997. *Id.* at Order Part E(2).

The SWPPP must include, among other requirements, the following: (a) identification of all the members of a stormwater pollution prevention team responsible for developing and implementing the SWPPP (*Id.* at Section A(3)); (b) a site map showing the stormwater conveyance system and areas of actual and potential pollutant contact and all areas of on-going industrial activity (*Id.* at Section A(4)); (c) a list of significant materials handled and stored at the site including quantities and frequencies (*Id.* at Section A(5)); (d) a description of all potential pollutant sources, industrial processes, material handling and storage, dust and particulate generating activities, significant spills and leaks, non-stormwater discharges, and potential soil erosion activity (*Id.* at Section A(6)); (e) an assessment of potential pollutant sources at the facility and a

description of the BMPs to be implemented at the facility that will reduce or prevent pollutants in stormwater discharges and authorized non-stormwater discharges, including structural BMPs where non-structural BMPs are not effective (*Id.* at Sections A(7-8)); (f) specification of BMPs designed to reduce pollutant discharge to BAT and BCT levels, including BMPs already existing and BMPs to be adopted or implemented in the future (*Id.* at Section A(8)); (g) a comprehensive site compliance evaluation completed each reporting year, and revisions to the SWPPP as necessary after the evaluation has been completed (*Id.* at Section A(9)); and (h) revisions to the SWPPP within 90 days after a facility manager determines that the SWPPP is in violation of any requirements of the Industrial Stormwater Permit (*Id.* at Section A(10)). Facility operators are required to at all times properly operate and maintain any facilities and systems of treatment and control (and related appurtenances) which have been installed or used to achieve compliance with the conditions of the Industrial Stormwater Permit and the requirements of the SWPPP. *Id.* at Order Part C(5).

ERC's SWPPP does not include, and ERC has not implemented, adequate BMPs designed to reduce pollutant levels in discharges to BAT and BCT levels in accordance with Section A(8) of the Industrial Stormwater Permit, as evidenced by the Facility's discharges of stormwater contaminated with pollutants at levels that exceed those attainable with application of BAT and BCT. Further, on information and belief, ERC's SWPPP lacks an adequate site map, fails to contain the requisite information on significant materials handled at the facility, and fails to provide any information on pollution generating and storage areas throughout the Facility. The SWPPP also lacks any discussion of Best Management Practices at the Facility. ERC's failure to prepare and/or implement an adequate SWPPP and/or to revise the SWPPP in all the above respects constitutes a violation of the Industrial Stormwater Permit, Section A(8) (SWPPP must specify BMPs necessary to attain BAT and BCT levels that are tailored to site conditions).

Accordingly, ERC has violated the Clean Water Act each and every day it has failed to develop and/or implement an adequate SWPPP meeting all of the requirements of Section A of the Industrial Stormwater Permit, and ERC will continue to be in violation every day that it fails to develop and/or implement an adequate SWPPP. ERC is subject to penalties for each violation of the Industrial Stormwater Permit and the CWA occurring within the past five (5) years.

4. Failure to Develop and Implement an Adequate Monitoring and Reporting Program and Perform Annual Comprehensive Site Compliance Evaluations as Required by the Industrial Stormwater Permit.

The Industrial Stormwater Permit requires facility operators to develop and implement a Monitoring and Reporting Program ("MRP") by October 1, 1992 or when industrial activities begin at a facility. Industrial Stormwater Permit, Section B: Monitoring Program and Reporting Requirements, (1) and Order Part E(3). The Industrial Stormwater Permit requires that the MRP ensure that each facility's stormwater

discharges comply with the Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations specified in the Industrial Stormwater Permit. *Id.* at Section B(2). Facility operators must ensure that their MRP practices reduce or prevent pollutants in stormwater and authorized non-stormwater discharges as well as evaluate and revise their practices to meet changing conditions at the facility. *Id.* This may include revising the SWPPP as required by Section A of the Industrial Stormwater Permit. The MRP must measure the effectiveness of BMPs used to prevent or reduce pollutants in stormwater and authorized non-stormwater discharges, and facility operators must revise the MRP whenever appropriate. *Id.* Facility operators are also required to provide an explanation of monitoring methods describing how the facility's monitoring program will satisfy these objectives. *Id.* at Section B(10).

Pursuant to the monitoring and reporting requirements of the Industrial Stormwater Permit, facility operators must conduct and record visual observations of all drainage locations at the facility for authorized non-stormwater, unauthorized non-stormwater, and stormwater discharges throughout the year. *Id.* at Sections B(3), (4), and (8). Facility operators must also implement responsive measures to eliminate unauthorized non-stormwater discharges, to reduce or prevent pollutants from contacting non-stormwater discharges, and to reduce or prevent pollutants in stormwater discharges. *Id.* at Sections B(3), (4), and (7).

In addition to conducting visual observations, facility operators are required to collect and sample stormwater samples during the first hour of discharge from the first storm event of the wet season and at least one other storm event in the wet season. *Id.* at Section B(5)(a). Facility operators that do not collect samples from the first storm event of the wet season are required to explain in the Annual Report why the first storm event was not sampled. *Id.* If either sample collection or monthly visual observations of stormwater discharges occur more than one hour after discharge begins, facility operators must explain in the Annual Report why the sampling occurred more than one hour after discharges began. *Id.* at Section B(8)(b). Further, facility operators are required to analyze the stormwater samples for toxic chemicals and other pollutants that are likely to be present in significant quantities and other analytical parameters associated with their Standard Industrial Classification ("SIC") Code. *Id.* at Section B(5).

To achieve the objectives of the monitoring program, facility operators must comply with certain procedural requirements, including explaining monitoring methods; providing a description of the visual observation and sampling methods, location, and frequency; and identifying the analytical methods and corresponding method of detection limits used to detect pollutants in stormwater discharges. *Id.* at Section B(10). Facility operators must submit an Annual Report by July 1 each year to the Regional Water Board that includes a summary of visual observations and sampling results, laboratory reports, the Annual Comprehensive Site Compliance Evaluation Report, an explanation of why a facility did not implement any required activities, and records specified in Sections B(13)-(14). Additionally, ERC is required to identify and sample all stormwater discharge locations. *Id.* at § B.5(a). Based on Baykeeper's visual observations of the

Facility and ERC's own stormwater sampling results, Baykeeper believes that ERC has failed to sample stormwater from all discharge locations at its Facility.

ERC stated in its Notice of Intent to be covered by the Industrial Stormwater Permit that its primary business falls under Standard Industrial Classifications ("SIC") 5065 (Electronic Parts and Equipment, Not Elsewhere Classified), 3571 (Electronic Computers), and 3577 (Computer Peripheral Equipment, Not Elsewhere Classified). However, the U.S. Department of Labor uses SIC Code 5065 to describe establishments "primarily engaged in the wholesale distribution of electronic parts and electronic communications equipment" (i.e. this refers to intact merchandise, not equipment that has been broken down into its component parts). Similarly, SIC Codes 3571 and 3577 are used to describe facilities that manufacture computers or computer peripheral equipment, such as plotters, and graphic displays. ERC's website characterizes the principal business activity at the Facility as the dismantling and recycling of electronic waste. Thus, the Facility is more accurately described by SIC Code 5093, Scrap and Waste Materials. Accordingly, the Industrial Stormwater Permit requires facilities in SIC Code 5093 to at least sample their stormwater for the metals aluminum, copper, iron, lead and zinc, as well as any other pollutants likely to be present. ERC has not consistently sampled its stormwater discharges for any metals or other parameters likely to be present in its stormwater including the numerous toxic pollutants commonly associated with electronic waste. Although ERC had one sample analyzed for the required metals parameters in the 2007-2008 Annual Report, that sample was collected by Containers Unlimited (now dba as Strategic Materials, Inc) from the Zephyr Street driveway which the facilities share. Since then, ERC has only sampled for the basic parameters otherwise required of all dischargers and appears to be sampling from the front parking lot rather than where the electronic waste storage and/or process areas are located in the back of the Facility. Thus, ERC has been operating the Facility with an inadequately developed and/or inadequately implemented MRP, in violation of the substantive and procedural requirements set forth above.

As demonstrated above, ERC's monitoring program has not ensured that stormwater discharges are in compliance with the Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations of the Industrial Stormwater Permit as required by Section B(2). The monitoring program has not resulted in practices at the Facility that adequately reduce or prevent pollutants in stormwater as required by Order Part B(2). ERC's MRP has failed to identify all pollutants in the Facility's stormwater discharges, monitor all stormwater discharges from the Facility, and effectively revise BMPs in use or the Facility's SWPPP to address such ongoing problems as required by Section B(2) of the Industrial Stormwater Permit.

As a result of ERC's failure to adequately develop and/or implement an adequate MRP at the Facility, ERC has been in daily and continuous violation of the Industrial Stormwater Permit and the CWA on each and every day for the past five years. These violations are ongoing. ERC will continue to be in violation of the monitoring and reporting requirements each day ERC fails to adequately develop and/or implement an effective MRP at the Facility. ERC is subject to penalties for each violation of the Industrial Stormwater Permit and the CWA occurring for the last five (5) years.

5. Discharges Without Permit Coverage.

Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), prohibits the discharge of any pollutant into waters of the United States unless the discharge is authorized by a NPDES permit issued pursuant to section 402 of the Clean Water Act. *See* 33 U.S.C. §§ 1311(a), 1342. In turn, ERC sought coverage under the Industrial Stormwater Permit, which states that any discharge from an industrial facility not in compliance with the Industrial Stormwater Permit "must be either eliminated or permitted by a separate NPDES permit." Industrial Stormwater Permit, Order Part A(1). Because ERC has not obtained coverage under any separate NPDES permit, and has not eliminated discharges not permitted by the Industrial Stormwater Permit, each and every discharge from the Facility described herein not in compliance with the Industrial Stormwater Permit has constituted and will continue to constitute a discharge without CWA permit coverage in violation of section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a).

IV. PERSONS RESPONSIBLE FOR THE VIOLATIONS

E Recycling of California is the person responsible for the violations at the Facility described above.

V. NAME AND ADDRESS OF NOTICING PARTY

Our name, address, and telephone number is as follows:

San Francisco Baykeeper
785 Market Street, Suite 850
San Francisco, CA 94103
(415) 856-0444

VI. COUNSEL

Baykeeper is represented by the following counsel in this matter, to whom all communications should be directed:

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Andrea Kopecky: (415) 856-0444 x110, andrea@baykeeper.org

VII. REMEDIES {tc "VII. REMEDIES " \l 2}

Baykeeper will seek declaratory and injunctive relief to prevent further CWA violations pursuant to CWA sections 505(a) and (d), 33 U.S.C. §1365(a) and such other relief as permitted by law. In addition, Baykeeper will seek civil penalties pursuant to CWA section 309(d), 33 U.S.C. § 1319(d) and 40 C.F.R. section 19.4, against ERC in this action. The CWA imposes civil penalty liability of up to $32,500 per day per CWA violation for violations occurring from March 15, 2004 through January 12, 2009, and $37,500 per day per violation for violations occurring after January 12, 2009. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (2009). Baykeeper will seek to recover attorneys' fees, experts' fees, and costs in accordance with CWA section 505(d), 33 U.S.C. § 1365(d).

Baykeeper intends, at the close of the 60-day notice period or thereafter, to file a citizen suit under CWA section 505(a) against ERC for the above-referenced violations. During the 60-day notice period, we are willing to discuss effective remedies for the violations noted in this letter. We suggest that ERC contact us within the next twenty (20) days so that these discussions may be completed by the conclusion of the 60-day notice period. Please note that we do not intend to delay the filing of a complaint in federal court even if discussions are continuing when the notice period ends.

Sincerely,

Andrea L. Kopecky

Andrea Kopecky
Associate Attorney
San Francisco Baykeeper

Cc:

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Attachment 1: EPA Benchmarks

Parameter	Units	Benchmark value
Biochemical Oxygen Demand	mg/L	30
Chemical Oxygen Demand (COD)	mg/L	120
Total Suspended Solids (TSS)	mg/L	100
Oil and Grease	mg/L	15
Nitrate + Nitrite Nitrogen	mg/L	0.68
Total Phosphorus	mg/L	2
pH	SU - low	6
pH	SU - high	9
Acrylonitrile	mg/L	7.55
Aluminum Total	mg/L	0.75
Ammonia Total (as N)	mg/L	19
Antimony, Total	mg/L	0.64
Arsenic Total	mg/L	0.15
Benzene	mg/L	0.01
Beryllium, Total	mg/L	0.13
Butylbenzyl Phthalate	mg/L	3
Chloride	mg/L	860
Copper Total	mg/L	0.0636
Dimethyl Phthalate	mg/L	1
Ethylbenzene	mg/L	3.1
Fluoranthene	mg/L	0.042
Fluoride	mg/L	1.8
Iron Total	mg/L	1
Lead Total	mg/L	0.0816
Manganese	mg/L	1
Mercury Total	mg/L	0.0024
Nickel Total	mg/L	1.417
PCB-1016	mg/L	0.000127
PCB-1221	mg/L	0.1
PCB-1232	mg/L	0.000318
PCB-1242	mg/L	0.0002
PCB-1248	mg/L	0.002544
PCB-1254	mg/L	0.1
PCB-1260	mg/L	0.000477
Phenols, Total	mg/L	1
Pyrene	mg/L	0.01
Selenium Total	mg/L	0.2385
Silver Total	mg/L	0.0318
Toluene	mg/L	10
Trichloroethylene	mg/L	0.0027
Zinc Total	mg/L	0.117
Cyanide Total (as CN)	mg/L	0.0636
Magnesium Total	mg/L	0.064
Electrical Conductivity @ 25 Deg. C	umhos/cm	200

Attachment 2: Alleged Dates of E Recycling of California's Violations, October 2007 to August 2012

Days with Precipitation One Tenth of an Inch or Greater, as reported by NOAA's National Climatic Data Center, Fremont station. http://www7.ncdc.noaa.gov/IPS/coop/coop.html.

2007	2008	2009	2010	2011	2012
10/10/07	1/3/08	1/2/09	1/12/10	1/2/11	1/20/12
10/12/07	1/4/08	1/22/09	1/13/10	1/30/11	1/21/12
10/17/07	1/5/08	1/23/09	1/19/10	2/17/11	1/23/12
12/18/07	1/7/08	1/24/09	1/20/10	2/18/11	2/7/12
12/20/07	1/8/08	2/5/09	1/21/10	2/19/11	2/13/12
12/29/07	1/21/08	2/6/09	1/22/10	2/20/11	2/29/12
	1/22/08	2/9/09	1/23/10	2/25/11	3/1/12
	1/23/08	2/11/09	1/26/10	3/6/11	3/13/12
	1/24/08	2/13/09	1/30/10	3/14/11	3/14/12
	1/25/08	2/14/09	2/5/10	3/18/11	3/17/12
	1/26/08	2/15/09	2/6/10	3/19/11	3/24/12
	1/27/08	2/16/09	2/9/10	3/20/11	3/25/12
	1/28/08	2/17/09	2/21/10	3/21/11	3/28/12
	1/30/08	2/22/09	2/23/10	3/24/11	3/31/12
	2/1/08	2/23/09	2/24/10	3/25/11	4/1/12
	2/19/08	2/24/09	2/26/10	3/26/11	4/10/12
	2/20/08	3/1/09	2/27/10	5/15/11	4/11/12
	2/21/08	3/2/09	3/3/10	5/17/11	4/12/12
	2/22/08	3/3/09	3/4/10	6/4/11	4/13/12
	2/24/08	3/4/09	3/10/10	6/28/11	4/26/12
	3/15/08	3/5/09	3/12/10	6/29/11	6/4/12
	4/23/08	3/22/09	3/25/10	10/4/11	
	11/1/08	4/7/09	3/31/10	10/5/11	
	11/2/08	4/9/09	4/1/10	10/6/11	
	11/3/08	4/10/09	4/5/10	11/4/11	
	11/26/08	5/1/09	4/11/10	11/6/11	
	12/14/08	5/5/09	4/12/10	11/20/11	
	12/15/08	9/14/09	4/20/10		
	12/16/08	10/13/09	4/21/10		
	12/19/08	10/14/09	5/18/10		
	12/22/08	10/19/09	5/25/10		
	12/23/08	10/20/09	5/27/10		
	12/25/08	11/20/09	10/24/10		
		11/28/09	10/30/10		
		12/7/09	11/7/10		

2007	2008	2009	2010	2011	2012
		12/11/09	11/20/10		
		12/12/09	11/21/10		
		12/13/09	11/23/10		
		12/21/09	11/27/10		
		12/27/09	12/5/10		
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			12/26/10		
			12/29/10		

Attachment 3: Water Quality Standards

Parameter	Units	Water quality standard	Source
Arsenic Total	mg/L	0.069	Basin Plan
Cadium, Total	mg/L	0.042	Basin Plan
Chromium VI	mg/L	1.1	Basin Plan
Copper Total	mg/L	0.0108	Basin Plan, Site Specific Objectives
Cyanide Total (as CN)	mg/L	0.0094	Basin Plan, Site Specific Objectives
Lead Total	mg/L	0.22	Basin Plan
Mercury Total	mg/L	0.0021	Basin Plan
Selenium Total	mg/L	0.29	California Toxics Rule
Silver Total	mg/L	0.0019	Basin Plan
Zinc Total	mg/L	0.09	Basin Plan
PAHs	mg/L	0.015	Basin Plan
Nickel Total	mg/L	0.0624	Basin Plan, Site Specific Objectives